On those grounds,

THE COURT

in answer to the question referred to it by the Crown Court at Bristol by order of 31 July 1978 hereby rules:

The application by an authority or court of a Member State to a worker who is a national of that same State of measures which deprive or restrict the freedom of movement of the person concerned within the territory of that State as a penal measure provided for by national law by reason of acts committed within the territory of that State is a wholly domestic situation which falls outside the scope of the rules contained in the EEC Treaty on freedom of movement for workers.

Kutscher Mertens de Wilmars Mackenzie Stuart Donner Pescatore

Sørensen O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 28 March 1979.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL WARNER DELIVERED ON 8 MARCH 1979

My Lords,

This case comes to the Court by way of a reference for a preliminary ruling by the Crown Court at Bristol. It raises questions as to the impact of Community law, and more particularly of Article 48 of the EEC Treaty, on a power that the

Crown Court has by virtue of the common law of England and Wales to refrain from passing sentence on a convicted offender and, instead, to bind him over on conditions.

That power must be distinguished from a number of other powers conferred on English criminal courts by statute, such as the power to grant a conditional discharge, the power to pass a suspended sentence, the power to defer sentence, and the power to make a probation order. It must also be distinguished from the power to recommend deportation, with which this Court was concerned in Case 30/77 *Reg.* v *Bouchereau* [1977] ECR 1999.

The power here in question stems, as I have indicated, from the common law, though it is mentioned in two recent statutes. One of them is the *Courts Act 1971* which, among other reforms, instituted the Crown Court to replace the old Assizes and Quarter Sessions. Section 6 (4) of that Act transferred the power from them to the Crown Court. The other statute is the *Powers of Criminal Courts Act 1973*, Section 1 of which created the statutory power to defer sentence, but provided that nothing therein should affect the common law power.

Essentially, the exercise of the power involves the release of a convicted person upon the acceptance by that person of an obligation to come up for judgment (i.e. appear before the Court for sentence) if called upon to do so on or after a prescribed future date and meanwhile to be of good behaviour and comply with such other conditions as the Court may impose. The document by which the obligation is accepted is known as a recognizance and it contains an acknowledgement by the convicted person that he owes the Crown a specified sum which will become payable if he fails to appear when called upon to do so. The recognizance has to be signed by the convicted person. If he refuses to cooperate, he must be dealt with in some other way.

Among the conditions that the Court may impose when exercising the power to bind over is a condition as to residence. The application of such a condition is normally limited to a specified period. In its written Observations the United Kingdom Government instanced two situations where, it submitted, "the binding over order may serve a valid and useful purpose in the administration of criminal justice". First, in the case of an alien normally resident abroad, rather than requiring him to serve a term of imprisonment in England, it may be preferable, if the offence is not a serious one, for the Court to give him the choice of returning to his own country. The second case was that of a first offender, particularly a young person, who has moved away from his home environment to a place where he has come under undesirable influences. Here again, the

ends of justice may be better served by restoring him to his home environment, instead of punishing him. The United Kingdom Government stressed the value of the power, in such circumstances, where the offender's home environment is a sheltered, rural one, but it seems to me that, in some cases at least, restoration of a young offender to his home environment may be beneficial even where it is urban.

At the hearing we were told by Counsel for the United Kingdom Government that, in practice, it was by probation orders that residential requirements were most commonly imposed by English criminal courts. As he explained, a probation order is a penal device whereby punishment is withheld if the offender agrees to be put under the supervision of a probation officer. The power to make such an order is now contained in Section 2 of the *Powers of Criminal Courts Act 1973*. Subsection (1) of that Section provides that:

"Where a court by or before which a person of or over seventeen years of age is convicted of an offence (not being an offence the sentence for which is fixed by law) is of opinion that having regard to the circumstances, including the nature of the offence and the character of the offender, it is expedient to do so, the court may, instead of sentencing him, make a probation order, that is to say, an order requiring him to be under the supervision of a probation officer for a period to be specified in the order of not less than one year nor more than three years."

Subsection (2) provides for a probation order to name the area in which the offender resides or will reside and for the offender to be under the supervision of a probation officer appointed for or assigned to that area. (This is subject to provisions in Schedule 1 to the Act relating to probationers who change their residence). Subsection (3) enables a probation order to require the offender to comply "with such requirements as the court, having regard to the circumstances of the case, considers necessary for securing the good conduct of the offender or for preventing a repetition by him of the same offence or the commission of other offences". Subsection (5) (as amended) enables the court, after it has considered the home surroundings of the offender, to include in a probation order a requirement that he shall reside in an approved probation hostel or in some other institution. Subsection (6) provides:

"Before making a probation order, the court shall explain to the offender in ordinary language the effect of the order (including any additional requirements proposed to be inserted therein . . .) and that if he fails to comply with it or commits another offence he will be liable to be sentenced for the original offence; and the court shall not make the order unless he expresses his willingness to comply with its requirements."

Probation officers belong to the Probation and After-Care Service which operates throughout England and Wales, so that it is always possible for a criminal court anywhere in England or Wales to make a probation order requiring residence in any part of either of those

two countries. There is a similar Service in Scotland, and there are reciprocal arrangements under which a probation order made in England or Wales can be given effect to in Scotland and vice versa. No such reciprocal arrangements exist, however, with Northern Ireland, making it possible for the authorities there to take charge officially of a convicted person who has been put on probation by an English court. Accordingly, in a case where it would be desirable to make a probation order requiring the offender to reside in Northern Ireland, the Crown Court can only resort to its common law power to bind him over.

Nonetheless, there are authorities that show that, in certain circumstances, a binding over order may be made for purposes more akin to those of a deportation order than to those of a probation order. Thus in *Reg.* v *Ayu* [1958] 1 WLR 1264 the Court of Criminal Appeal (now the Court of Appeal, Criminal Division) held that such an order could be made to secure the return to Nigeria of a Nigerian who had been in England since 1939 on the simple grounds that he had done no regular work since 1948 and had 16 previous convictions. It is significant that Lord Parker L.C.J., who delivered the Judgment of the Court, concluded it by saying "I should add that this case shows very clearly the need which has already been canvassed, I understand, in other quarters for there being power to deport a man such as this". That was, of course, in the days before English criminal courts were given power to recommend foreign offenders for deportation. I would refer also to the passage from Archbold's "Pleading, Evidence and Practice in Criminal Cases" cited by the Commission in its written Observations. It is there said, of the power to bind over: "On occasions in the past the power has been exercised where the court wished to ensure that the offender left England".

A case that seems to me to illustrate strikingly the affinity that can exist between a binding over order with a condition as to residence and a deportation order is *Reg.* v *Secchi* [1975] 1 CMLR 383. This concerned a young Sardinian who was convicted before a Metropolitan Stipendiary Magistrate of criminal offences committed in London. The learned Magistrate recommended him for deportation on the footing that he was not a "worker" but an "itinerant vagrant", and so was not entitled to the protection of Article 48 of the Treaty. But among the learned Magistrate's findings were findings that Mr Secchi had no money, no qualifications, no contacts in England, no knowledge of English and no lawful accommodation. He added: "The conclusion of the probation officer, with which I fully concur, is that with no roots of any kind in this country and with the difficulties in the way of him settling down here, it would be in the best interests of all concerned including the defendant for him to return to Sardinia where his mother and other members of his family still reside". On those findings, if Mr Secchi had been convicted before the

Crown Court instead of before a Magistrate (to whom the common law power does not extend), it would have been a classic case, according to what we were told on behalf of the United Kingdom Government, for that Court to make a binding over order with a condition that Mr Secchi should return to Sardinia.

I turn to the facts of the present case.

Miss Vera Ann Saunders was born on 16 April 1957 and is a United Kingdom citizen. From what was said at the hearing, it appears that she may be a native of Northern Ireland. On 21 December 1977 she pleaded guilty in the Crown Court at Bristol to a charge of having stolen a National Savings Bank Book. For that offence she was liable to a sentence of imprisonment. She was at the time residing in England, but she expressed to the Court a wish to go to Northern Ireland to live and a willingness to be bound over on condition that she should do so. The Court ordered that she be bound over in her own recognizance of £ 50 to "come up for Judgment on or after 16 January 1978 unless she proceeds to Northern Ireland before that date and does not enter England or Wales for a period of three years". She signed a recognizance in those terms. Your Lordships observe that those terms imposed no obligation on her to stay in Northern Ireland once she had got there. She was free thereafter to go to Scotland or anywhere else outside England or Wales. The only requirement of lasting effect was that she should keep out of England and Wales for three years.

On behalf of the United Kingdom Government it was emphasized that the absence of reciprocal arrangements with the authorities in Northern Ireland meant that the Crown Court did not have the option of making a probation order applicable to Miss Saunders in Northern Ireland. Our attention was drawn to a note on the back of the indictment showing that she was subject to an earlier probation order dated 29 November 1977, made on her conviction for a different offence. The note states "Probation Order dated 29 November 1977 remains in force and Irish authorities will be asked to supervise on an unofficial basis". Thus, it was submitted, everything had been done to make her position as close as could be to what it would have been if it had been possible to put her on probation in Northern Ireland.

Miss Saunders did not comply with the terms of the Order. She was arrested in Wales on 1 June 1978 and brought back before the Crown Court on 13 June. As a matter of English law, it was then open to the Court to proceed forthwith to judgment on her for the original offence or to forfeit her recognizance or both. However, on this occasion, Counsel for the prosecution raised the point that she might be a "worker" within the meaning of the Treaty and that the Order of 21 December 1977 might have infringed her rights under Article 48. There were cited

to the Crown Court the decisions of this Court in Case 41/74 *Van Duyn* v *Home Office* [1974] 2 ECR 1337, Case 67/74 *Bonsignore* v *Stadt Köln* [1975] 1 ECR 297, Case 36/75 *Rutili* v *Ministre de l'Interieur* [1975] 2 ECR 1219 and *Reg.* v *Bouchereau* (already cited) as well as the decision of the Metropolitan Magistrate in *Reg.* v *Secchi* (already cited).

The Crown Court came to the conclusions (i) that Miss Saunders should be treated as a worker within the meaning of the Treaty and (ii) that the Order of 21 December 1977 did not fall within any of the limitations "on grounds of public policy, public security or public health" allowed by Article 48. The question it has referred to this Court is:

"Whether the Order of this Court made in the case of Vera Ann Saunders on 21 December, 1977, may constitute a derogation from the right given to a worker under Article 48 of the Treaty establishing the European Community, having regard in particular to the right specified in Article 48 (3) (b) of the said Treaty, and to the fact that she appears to be an English national."

As the United Kingdom Government pointed out, the use of the expression an "English" national is inapt, since there is no such status known to the law. Strictly the reference should have been to "a citizen of the United Kingdom and Colonies having the right of abode in the United Kingdom", a formula that I abbreviated earlier to "United Kingdom citizen".

The question is inaptly worded also in that it invites this Court to rule directly on the validity of the Crown Court's own Order. That would be beyond the jurisdiction of this Court under Article 177 of the Treaty. One can however readily distil from the question as formulated the points on which the Court is called upon to rule in this case. They are points of some moment.

The Commission submits that the case falls outside the scope of Article 48, and indeed of the Treaty as a whole, for want of any connecting factor with another Member State which would prevent it from being treated in purely national terms. According to the Commission, a measure taken by a Member State restricting the right of residence of one of its own nationals to part only of its own territory is outside the scope of application of the Treaty "unless the grounds for such restriction be linked with, or related to, events localized in another Member State".

The Commission relies, in support of that submission, on a dictum in paragraph 24 of the recent Judgment of the Court in Case 115/78 the *Knoors* case (7 February 1979, not yet reported). That dictum, which is *obiter*, is to the effect that the provisions of the Treaty relating to freedom of establishment and to freedom to provide services are inapplicable in a case wholly internal to a Member State. The dictum was uttered in a very narrow context, in that the Judgment of the Court was there dealing with an argument put forward by the Dutch Government to the effect that a person ought not be to allowed to evade the requirements of the legislation of his home Member State as to the qualifications needed to practise a particular trade by deliberately going to acquire the more lax qualifications

accepted in another Member State. I entertain, for my part, some doubt as to whether the dictum can be taken literally as generally applicable in the fields of freedom of establishment and freedom to provide services. Whether it can or not must depend on a closer analysis of the Articles of the Treaty relating to those matters than the Court was called upon to make in the *Knoors* case, where it was essentially concerned with the interpretation of the relevant General Programmes and of certain Council Directives. But I entertain no doubt that that dictum cannot be treated as stating a sweeping principle that no provision of the Treaty, or no provision of it about the free movement of persons, can apply in a case "wholly internal to a Member State".

We are here concerned with Article 48 of the Treaty, and whether this case falls outside the scope of the Treaty must depend upon the correct interpretation of that Article. In approaching that question it has to be borne in mind, first, that the Treaty, in many ways, confers on the citizens of each Member State rights enforceable against the authorities of that State and, secondly, that Article 7 of the Treaty forbids discrimination by a Member State against its own nationals as much as it forbids discrimination by a Member State against the nationals of other Member States.

If it was open to the Crown Court to exclude Miss Saunders from England and Wales for three years, and so to confine her, so far as United Kingdom territory was concerned, to Northern Ireland and Scotland, it must follow that either (i) it is open to that Court to make the same order in the case of a national of another Member State, a proposition of which the least that can be said is that it cannot be accepted without careful consideration or (ii), if the same order could not be made in the case of a national of another Member State, that the result, at least *prima facie*, is an infringement of the principle that the nationals of all Member States are entitled to the same treatment. I do not say that there is no possible solution of that apparent dilemma. My point here is that one cannot dispose of this case *in limine* on the simple ground that there is nothing to connect it with any other Member State. The true question here is not whether the case has any connexion with another Member State, but whether and, if so, to what extent Community law confers rights on a person in Miss Saunders's position.

It was submitted on behalf of the United Kingdom Government that Article 48 does no more than forbid discrimination on grounds of nationality and that it leaves a Member State free to impede the free movement of workers within its territory on any other ground. So here it was enough to render the Crown Court's Order of 21 December 1977 valid that, as a matter of English law, it could have been made in respect of a person of any nationality.

In support of that proposition the United Kingdom Government cited the *Rutili* case where this Court held that:

"In particular, measures restricting the right of residence which are limited to part only of the national territory may not be imposed by a Member State on nationals of other Member States who are subject to the provisions of the Treaty except in the cases and circumstances in which such measures may be applied to nationals of the State concerned."

([1975] 2 ECR at pp. 1236—1237).

That ruling, however, is negative in form and effect. It means that a Member State may not impose a restriction of the kind in question on a national of another Member State in circumstances in which it could not impose the restriction on one of its own nationals. It does not mean that a Member State may impose any restriction it chooses on the movement of workers within its territory if nationals of all Member States are treated alike. To my mind, the passage of the Judgment in the *Rutili* case that is in point here is paragraph 27, where the Court made it clear that Article 48 enshrines two fundamental principles, that of equal treatment and that of freedom of movement for workers.

The latter seems to me the only view consistent with the wording of Article 48 itself. Discrimination based on nationality is mentioned only in paragraphs 2 and 3 (c), and perhaps, implicitly, in paragraphs 3 (d) and 4 of that Article. The all important provision in the present case, Article 3 (b), confers on a worker who is a national of any Member State the right "to move freely within the territory of Member States" for the purpose of accepting offers of employment. The only limitations to which that right is expressed to be subject are those "justified on grounds of public policy, public security or public health".

I should perhaps emphasize that the words are "to move freely within the territory of Member States" and not merely "to move freely from one Member State to another". Thus the right is *prima facie* one of access to every part of every Member State's territory. That is as one would expect, since the free movement of persons has as its object to contribute to the establishment of a common market in which the nationals of all Member States may take part in economic activity anywhere on the territory of the Community (see paragraph 18 of the Judgment of the Court in Case 136/78 *Ministère Public* v *Auer*, 7 February 1979, not yet reported).

Another submission put forward on behalf of the United Kingdom Government was that an order of the kind here in question could not infringe any provision of Community law because it was based upon consent. Analogies were invoked such as that of the acceptance by a person by a contract of employment of an obligation to live in a certain place, and that of the acceptance of a bequest having attached to it an obligation to live in a particular house. In my opinion, however, it is unrealistic to treat as a consensual act the acceptance of a residential restriction by a convicted person faced with the possible alternative of imprisonment.

So I come to what seems to me to be the real problem in this case. As was pointed

out on behalf of the United Kingdom Government, criminal courts throughout the Community have, and necessarily must have, a variety of powers to restrict people's freedom, of which the most obvious is the power to imprison. It cannot be supposed that the authors of the Treaty meant to deny them those powers. I do not think, for my part, that they can be regarded as saved by the express references to "public policy" and "public security" in Article 48 (3) because those concepts are so narrow. In my opinion, it is common sense that dictates that Article 48 should be interpreted as manifestly not intended to abolish the powers of criminal courts. The real problem is the extent to which Community law should be held to limit those powers. I heed the warning uttered on behalf of the Commission that this Court must beware of "taking over the sentencing policies of the individual Member States". Nonetheless, as *Reg.* v *Bouchereau* demonstrates, this Court cannot ignore the problem altogether.

In my opinion the solution lies in distinguishing between, on the one hand, restrictions on the freedom of movement of individuals imposed by criminal courts in the ordinary course of the administration of justice and, on the other hand, an order made by a criminal court for the purpose of securing the deportation of a person or his banishment from a substantial part of the territory of the Member State to which that court belongs.

In the former category I would include imprisonment, probation orders, orders granting bail with a condition as to residence and an order binding over an offender with a condition as to residence designed to secure his return to his home environment or to spare him imprisonment in a foreign land. In the case of orders within that category I would hold that Community law leaves the powers of national courts unfettered.

In the case of deportation or banishment orders, however, I would hold that they can be justified only if made on grounds of public policy or public security consistently with the law as stated by this Court in the line of cases to which *Reg.* v *Bouchereau* belongs; and I would hold of course that that is so regardless of the nationality of the offender concerned provided it is the nationality of one of the Member States.

If Your Lordships adopt that solution, it will be for the Crown Court at Bristol to decide itself into which category its Order of 21 December 1977 fell. It appears to have decided already that, if it fell in the second category, it could not be justified on grounds of public policy or public security.

In the result I am of the opinion that Your Lordships should, in answer to the question referred to this Court by the Crown Court, rule that, where a worker who is a national of a Member State of the EEC has been convicted of a criminal offence, the making of an order, as an alternative to sentence, requiring him for a specified period to reside in a specified place or to refrain from going to a specified place is not incompatible with Article 48 of the Treaty, provided that the purpose of the order is not merely to exclude the person concerned from the territory or from a substantial part of the territory of the Member State to which that court belongs. Where the latter is the purpose the order is compatible with Article 48 only in so far as it may be justified on grounds of public policy or public security.